September 12, 2001

No. 00-1167 (8)

Supreme Court, U.S.
FILED
SEP 12 2001
CLERK

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, INC., et al.

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

*CHRISTOPHER G. SENIOR
DAVID CRUMP
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 266-8200

Attorneys for Amicus Curiae
**Counsel of Record*

19pp

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. MORATORIA SHOULD BE ANALYZED AS TAKINGS UNDER THE CONSTITUTION, IN RECOGNITION OF THE FACT THAT THEY HAVE THE SAME EFFECT ON AS ANY OTHER GOVERNMENTAL REGULATORY SCHEME WHICH FREEZES OR ELIMINATES ECONOMICALLY VIABLE USE OF PROPERTY 3

A. MORATORIA ARE NOT MERE PLANNING DELAYS 5

B. LAND IS FUNDAMENTALLY DIFFERENT FROM OTHER PROPERTY, AND IMPACTED FAR DIFFERENTLY BY A TEMPORARY FREEZE ON USE 6

C. CALCULATION OF ACTUAL DAMAGES SHOULD BE THE PRIMARY ANALYSIS IN THE COMPENSATION PHASE OF A TAKINGS CASE, NOT WHEN DETERMINING WHETHER OR NOT A TAKING HAS OCCURRED 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Page(s)**

Agins v. City of Tiburon, 447 U.S. 255 (1980) 1

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2

Eberle v. Dane County Board of Adjustment, 595 N.W. 2d 730 (Wis. 1999) 4

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 3

Florida Rock Indus. v. United States, 45 Fed. Cl. 21 (1999). 9

Hughes v. Washington, 389 U.S. 290 (1967) 11

Keshbro, Inc. et al. v. City of Miami, et al., 2001 WL 776555 (Fla. 2001) 4

Lopes v. City of Peabody, 718 N.E.2d 846 (Mass. 1999) 4

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 11

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 1

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340 (1986) 1

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922
(Texas 1998) 11

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island, 533 U.S. __, 121 S.Ct. 2448
(2001) 2

San Diego Gas & Electric Co. v. City of San Diego,
450 U.S. 621 (1981) 1

Steel v. Cape Corp., 667 A.2d 634 (Md. App. 1996) 4

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 2

*Williamson County Regional Planning Comm'n
v. Hamilton Bank*, 473 U.S. 172 (1985) 1

Woodbury Place Partners v. City of Woodbury, 492
D.W.2d 258 (Minn. Ct. App. 1993) 4

Yee v. City of Escondido, 503 U.S. 519 (1992) 1

LEGAL JOURNALS & REFERENCE BOOKS

Black's Law Dictionary 1026 (7th ed. 1999) 3

Merriam-Webster's Dictionary of Law (1996) 3

J. Margaret Tretbar, *Calculating Compensation for
Temporary Regulatory Takings*, 42 U. Kan.L.Rev. 201
(1993) 4, 9

Scott E. Mollen, *Moratorium Declared Unconstitutional*,
206 N.Y.L.J. 4 (1991) 6

David Schultz, *The Price is Right! Property Valuation
For Temporary Takings*, Hamline L. Rev. 281 (1998) .10

NEWSPAPERS

Stephany Boyd, *New Vote Possible for Blue Hill Ban*,
Bangor Daily News, March 26, 1998 5

George Stankevich, *Moratoria on Development*, The
Independent (accessed Sept. 10, 2001)
<www.indyeastend.com/lex/052798lx.htm> 3

Steve Chawkins, *Ventura Mulls Building Moratorium*, Los
Angeles Times, June 4, 2001, at B4 5

John Fuchs, *Moratorium No Substitute for Poor Planning*,
Milwaukee Journal-Sentinel, February 14, 1998, at 2 5

Luis Monteagudo Jr., *Planners Sidestep Building Moratorium Issue*, San Diego Union-Tribune, July 14, 2001, at B3:2 5

Mike Lindbolm, *Newcomers Opposition To Development Refueled Anti-Growth Movement,* Seattle Times, June 4, 1999, at B3 6

INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of the petitioners. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 203,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedies available to its members under the U.S. Constitution, particularly as here when a lower court has so clearly misinterpreted a decision of the U.S. Supreme Court.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a number of cases involving the rights of property owners and the remedies available to them when their rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S.

---

[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authorized this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. ---, 121 S.Ct. 2448 (2001).

SUMMARY OF ARGUMENT

By excluding governmentally imposed building moratoria from review as takings of property, the U.S. Court of Appeals for the Ninth Circuit has misread this Court's opinion in *First English* and stripped property owners of their right to petition the courts for redress for what is unquestionably a governmental action which blocks the full and fair exercise of the rights of property ownership. By looking at governmental intent in adopting moratoria rather than the effect such regulatory acts have on property, the Ninth Circuit further misapplied well-settled takings law precedent.

This Court must not only reverse the erroneous decision below, but should also provide a clear analytical framework for all courts to utilize when analyzing moratoria as temporary takings. This analysis should draw upon this Court's prior takings jurisprudence, including precedent on distinct investment-backed expectations. Such an analysis should use these expectations as both a threshold test and, more comprehensively, in determining the actual amount of just compensation owed a property owner. This two-stage review would help end the confusion which leads too many courts to confuse the amount of just compensation owed with the existence of the right to just compensation itself, a problem which is particularly acute when analyzing compensation due as the result of moratoria.

ARGUMENT

I. MORATORIA SHOULD BE ANALYZED AS TAKINGS UNDER THE CONSTITUTION, IN RECOGNITION OF THE FACT THAT THEY HAVE THE SAME EFFECT ON AS ANY OTHER GOVERNMENTAL REGULATORY SCHEME WHICH FREEZES OR ELIMINATES ECONOMICALLY VIABLE USE OF PROPERTY.

It is well-settled law that when a governmental regulatory action strips property of its essential value that a taking has occurred requiring the payment of just compensation. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court recognized that even time-limited regulations which freeze the use of property may also be compensable takings.

Black's Law Dictionary defines moratoria as "the suspension of a specific activity[2]," and Merriam-Webster's Dictionary of Law adds that they are "a waiting period set by an authority[3]." A planning moratorium in particular is "the most extreme land-use action that a municipality can take because it suspends completely the rights of owners to use their property.[4]" While moratorium come in many variations, they all prohibit the use of property in some manner, for some length of time, and for some at least allegedly legitimate purpose.

But regardless of their form, the economic consequences of moratoria are real, and they are

---

[2] *Black's Law Dictionary* 1026 (7th ed. 1999).
[3] *Merriam-Webster's Dictionary of Law* (1996).
[4] George Stankevich, *Moratoria on Development*, The Independent (accessed Sept. 10, 2001) <www.indyeastend.com/lex/052798lx.htm>

permanent. That the actual regulation itself is 'temporary' merely impacts the degree of just compensation owed, not the existence of the injury itself. Some examples of the real economic consequences inflicted on property owners by temporary restrictions include loss of rents[5], loss of commercial lease payments[6], loss of development profits[7], loss of interest paid on secured loans related to property development, loss of access to the property[8], and the payment of real estate taxes and assessments during the period of restriction[9].

Indeed, moratoria may "restrict not only the landowner's ability to develop the property, but also affect selling prospects and any expectations of income producing potential."[10] Moratoria can have serious economic consequences.

Had some form of what was just described carried some other name, it would be hard to imagine how any court would not at least analyze such an exercise of raw governmental power as a taking. Yet, once the label "moratoria" is applied, along with the concept of a "limited duration," courts such as the one below often throw up their hands and declare that takings law simply does not apply. These decisions proceed from fundamental misconceptions of both law and fact.

---

[5] Keshbro, Inc., et al. v. City of Miami, et al., 2001 WL 776555 (Fla. 2001)
[6] Woodbury Place Partners v. City of Woodbury, 492 N.W. 2d 258 (Minn. Ct. App. 1993)
[7] Steel v. Cape Corp., 677 A.2d 634 (Md. App. 1996)
[8] Eberle v. Dane County Board of Adjustment, 595 N.W. 2d 730 (Wis. 1999)
[9] Lopes v. City of Peabody, 718 N.E.2d 846 (Mass. 1999)
[10] Tretbar, Calculating Compensation for Temporary Regulatory Takings, 42 U. Kan.L.Rev. 201, 217 (1993).

A. MORATORIA ARE NOT "MERE PLANNING DELAYS."

There are those who claim, some more sincerely than others, that moratoria are nothing more than mere delays inherent in the land use approval process, much like time spent reviewing permit applications or the time spent in public hearings.

Nothing could be further from the truth.

One need go no further than a local newspaper to see that moratoria are often a political tool rather than one used selectively by planners. In Bangor, Maine, "[a] new petition drive may result in another vote on a proposal to temporarily ban large commercial [construction] projects."[11] "In the face of a serious election challenge, the current Brookfield administration has declared a building moratorium on Captiol Drive," reads the first line of a story from Wisconsin.[12] In San Diego, California, "[c]ounty planning commissioners yesterday declined to get involved in the debate over a proposed building moratorium . . . . 'It's a highly political issue,' said [one] commissioner."[13] "In the wake of bitter neighborhood opposition to a proposed McDonald's, Ventura officials are considering an eight-month ban of most commercial development," reads another report.[14]

These stories are representative of what can only be described as nakedly political efforts to strip away the

---

[11] Stephany Boyd, *New Vote Possible for Blue Hill Ban*, Bangor Daily News, March 26, 1998.
[12] John Fuchs, *Moratorium No Substitute for Poor Planning*, Milwaukee Journal Sentinel, February 14, 1998, at 2.
[13] Luis Monteagudo Jr., *Planners Sidestep Building Moratorium Issue*, San Diego Union-Tribune, July 14, 2001, at B3:2.
[14] Steve Chawkins, *Ventura Mulls Building Moratorium*, Los Angeles Times, June 4, 2001, at B4.

property rights of the few for the satisfaction of the many. In fact, moratoria are even used to override professional land use management plans adopted by communities but later opposed by the local 'not-in-my-backyard' choir.[15] Moratoria, if anything, are certainly not normal parts of the planning process.

One legal newspaper summed up the role that moratoria are actually playing in the development process. "In an effort to forestall development, towns will sometimes enact moratorium statutes. Developers confronted with such moratorium statutes must decide whether to risk antagonizing town officials by litigating or wait for the moratorium to be lifted."[16]

As such, courts can not reasonably consider moratoria to be within the scope of a normal plan or permit review process. They are powerful, damaging regulations, which need to be considered in the same legal light as any other governmental action that takes property.

B. LAND IS FUNDAMENTALLY DIFFERENT FROM OTHER PROPERTY, AND IMPACTED FAR DIFFERENTLY BY A TEMPORARY FREEZE ON USE.

In analyzing the petitioners' claims, the Ninth Circuit Court of Appeals suggests two categories of economic consequences resulting from temporary property restrictions. In the first instance, a permanent regulation subsequently invalidated that results in the loss of all economic, beneficial or productive use, while in effect, is

[15] See, e.g., Mike Lindbolm, *Newcomers Opposition To Development Refueled Anti-Growth Movement*, Seattle Times, June 4, 1999, at B3.
[16] Scott Mollen, *Moratorium Declared Unconstitutional*, 206 N.Y. L.J. 4 (1991).

categorized as a "temporary taking", compensable under the Fifth Amendment.

In the second instance, a temporary regulation that results in a loss of all economic, beneficial or productive use, while in effect, is categorized by the court as a mere fluctuation in value. The Ninth Circuit perceives this fluctuation like a series of tickertape readings of stock market price quotations, even though the actual economic loss may be identical to that in the first category.

An ownership interest in land differs greatly from an ownership interest in a share of stock. Land is tangible; stock is intangible. Stock will fluctuate in value from the time it is purchased until the time it is sold. Land will also fluctuate in value from the time it is purchased, until sold. However, unlike stock, in that interval between purchase and sale, land may be used. It may be farmed, leased, built upon, subdivided, mined, or employed for income production in countless ways. Given adequate resources, the only limits are those of imagination, and government restrictions.

The economic effect from the loss of all beneficial, productive or economic use of land is a permanent effect that is not restored by the cessation of the temporary regulation. A crop has not been harvested, rents have not been collected, income has not been realized.

It is this concept that the Ninth Circuit, and other courts, fails to comprehend. If a governmental regulation halted pension payments to retirees, no one would accept an argument that no taking would occur if the grandchildren of those individuals were later able to collect the money, without interest, years later. Yet that argument is made regularly with regard to real property whenever a court claims that "sometime in the future" the

land can still be used, even if it that means by some future owner (including the descendants of the present owner).

That land is perpetual is used to justify stripping away present value on the basis of potential future uses, conveniently ignoring the reality of the saying 'in the long run, we're all dead' – including the current owners of that moratoria-strangled parcel of real property.

This Court must clearly explain this simple but deeply misunderstood reality through this opinion, and remind other courts that when real property is taken, justice delayed is indeed justice denied. That real property may last indefinitely does not support the proposition that it can never suffer a temporary taking.

C. CALCULATION OF ACTUAL DAMAGES SHOULD BE THE PRIMARY ANALYSIS IN THE COMPENSATION PHASE OF A TAKINGS CASE, NOT WHEN DETERMINING WHETHER OR NOT A TAKING HAS OCCURRED.

Courts such as the Ninth Circuit have consistently confused the establishment of a takings claim with the calculation of the precise degree of just compensation owed a private property owner. Time and again judges have focused on how little actual damage they perceive has occurred in the takings case before them, basing their judgments on little more than the self-protective pleas of local governments or their own often minimal understanding of the land development process.

The demand that petitioners prove they have lost everything in order to receive any compensation at all has

led to comments like this from Judge Smith of the Federal Court of Claims:

> The notion that the government can take two- thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Florida Rock Indus. v. United States, 45 Fed. Cl. 21, 23 – 24 (1999).

Indeed, it does ignore the point of the Takings Clause to rule that while a property owner may have suffered grievous financial loss as the result of a governmental moratorium, if even a bare smidgen of value remains – at least to the court – no takings claim can stand.

That calculating actual damages in a moratorium case can present somewhat of a challenge is understandable. "Identification of what the property owner has lost as a result of the land- use regulation in question is not an easy process."[17] Another commentator notes that, "[u]nlike permanent takings, where the condemnor pays the owner the full fair market value for the property acquired,

[17] Tretbar, 42 U. Kan. L. Rev. at 216.

temporary takings suggest alternative compensatory schemes simply because they are temporary."[18]

Unlike most other regulations, moratoria place an immediate and complete freeze on the use of property. While this freeze is theoretically finite, during its existence an owner losses 100% of his ability to use his property in any way contrary to the restrictions imposed under the moratoria. Of course, due to the nature of real property, the land is unlikely to have lost 100% of its value during the moratorium, though the actual damages could be substantial.

What may work most efficiently to balance such a difficult legal equation is a two-step takings analysis using the well-developed concept of distinct investment-backed expectations. First, a court would use these investment-backed expectations as a simple threshold requirement, where proof of deprivation of economically viable use of property would be enough to show the existence of a taking. Second, these same distinct expectations would be weighed as the central component of the debate over compensation, where each side would be free to battle over how much – if anything – should actually be awarded.

Rather than forcing plaintiffs to show the elimination of all economic value to prove governmental liability for a takings claim, a plaintiff would be required to show only the existence of distinct, investment-backed expectations and evidence indicating the degree to which they have been frustrated. The government, at this threshold stage, could present evidence challenging the degree of impact, or the validity of the expectations in the first place.

---

[18] David Schultz, *The Price is Right! Property Valuation For Temporary Takings*, 22 Hamline L. Rev. 281, 301 (1998).

However, instead of battling over percentages of loss and the full impact of the regulation upon the property, here a court would need only ascertain that 1) distinct investment-backed expectations exist, and that 2) they have been frustrated because the property owner has been denied the ability to put his land to economically viable uses for a period of time.

That such a focus is not only reasonable but central to most takings analysis is echoed throughout cases of this Court and others. "The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); "[I]nterference with distinct investment-backed expectations, [is] a way of limiting takings recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); "Even if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations. . . . The reasonable investment-backed expectation of the claimant is critical to this analysis. . ." *Mayhew v. Town of Sunnyvale*, 964 SW2d 922, 937 (Texas 1998).

This focus on effect would also steer the takings debate away from the far too commonly addressed and constitutionally invalid focus on governmental intent. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." *Hughes v. Washington*, 389 U.S. 290, 298 (Stewart, J. concurring).

CONCLUSION

The National Association of Home Builders respectfully requests this Court to rule that moratória should indeed be analyzed as temporary takings for all the reasons described above, and to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

DATED: September 12, 2001

Respectfully submitted,

*Christopher G. Senior
David Crump
National Association
of Home Builders
**Counsel of Record for*
Amicus Curiae